

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 13**

TRACTOR COMPANY d/b/a CCS TRUCKING,)	13-RC-22018
Employer,)	13-RC-67437
and)	
TEAMSTERS LOCAL UNION NO. 727, INTL.)	
BROTHERHOOD OF TEAMSTERS,)	
Petitioner,)	
add)	
LOCAL 707, TRUCK DRIVERS, CHAUFFEURS,)	
WAREHOUSEMEN AND HELPERS UNION,)	
Petitioner.)	

**EXCEPTIONS TO SUPPLEMENTAL HEARING OFFICER'S
REPORT ON OBJECTIONS AND CHALLENGED BALLOTS**

NOW COMES Tractor Company d/b/a CCS Trucking ("CCS Trucking"), Employer, by and through its attorneys of record, Law Offices of Rory K. McGinty, P.C., and for its Exceptions to the Supplemental Hearing Officer's Report on Objections and Challenged Ballots, states as follows:

**I. EXCEPTION TO THE FINDING THAT
OMISSIONS FROM THE *EXCELSIOR* LIST PREJUDICED THE ELECTION
BASED ON THE PERCENTAGE OF OMISSIONS.**

The Hearing Officer's original Report found there were thirteen (13) eligible voters, including 11 on the *Excelsior* list, plus Brian Powell and Kenneth Kendal, who had been omitted from the list. (Rpt. at 10).

The Supplemental Hearing Officer's Report found the relevant omission rate was 2 out of 13 or 15.4%. (Supp. Rpt. at 2).

In both Board decisions cited in the Supplemental Hearing Officer's Report, the percentage was calculated on the basis of eligible voters who were omitted from the *Excelsior*

list and who were therefore prevented from voting. *Automatic Fire Systems*, 357 NLRB No. 190 (2012); *Thrifty Auto Parts*, 295 NLRB 1118 (1989).

In the instant case, only one (1) eligible voter did not vote because he was omitted from the *Excelsior* list. Brian Powell and Kenneth Kendal were both omitted from the *Excelsior* list. However, Brian Powell did vote. (Tr., Dec. 20, 2011 at 12, 13). CCS Trucking did not object to the casting of a ballot by Powell. (Tr. Dec. 20, 2011 at 12). His ballot was opened and his vote was counted as part of the Revised Tally of Ballots on August 13, 2012¹. (Supp. Rpt. at 2). CCS Trucking did not object to Powell's vote being counted as part of the Revised Tally of Ballots. Only Kendal did not vote. (Tr., Dec. 20, 2011 at 29). Had he voted, CCS Trucking would not have objected to his ballot.

The Supplemental Hearing Officer's Report cites the decision of the Board in *Thrifty Auto Parts* as a benchmark for assessing the percentage of omissions from the *Excelsior* list as one factor in determining whether the employer substantially complied with *Excelsior* requirements. (Supp. Rpt. at 2). Omissions from the *Excelsior* list in *Thrifty Auto Parts* constituted 2 out of 21 or 9.5% of eligible voters. *Thrifty Auto Parts*, 295 NLRB at 1118. The tally of ballots in *Thrifty Auto Parts* showed eight votes against and seven votes in favor of the Petitioner with no void or challenged ballots. *Thrifty Auto Parts*, 295 NLRB at 1118. The 2 eligible voters who did not vote in *Thrifty Auto Parts* because they were omitted from the *Excelsior* list therefore "amounted to a determinative number of voters." (Supp. Rpt. at 2).

In the instant case, the sole eligible voter who did not vote, Kendal, constituted only

¹Teamsters Local 727 had challenged 5 ballots. The Board Agent had challenged Brian Powell's ballot. All 6 of the Challenged Ballots were opened and counter as part of the Revised Tally of Ballots.

7.7% of the 13 eligible voters. This is well under the benchmark set in *Thrifty Auto Parts*. Moreover, unlike the 9.5% of eligible voters who did not vote in *Thrifty Auto Parts* who did not vote because they were omitted from the *Excelsior* list, Kendal's ballot could not have been determinative in the instant case. The Revised Tally of Ballots was 8 in favor of Local 707 and 4 in favor of Local 727. Even Kendal and Powell together could not have been determinative in such a lopsided election.

**II. EXCEPTION TO THE FINDING THAT
OMISSION OF BRIAN POWELL FROM THE *EXCELSIOR* LIST
PREJUDICED THE ELECTION IN SUCH A MANNER
AS TO REQUIRE A SECOND ELECTION.**

The evidence of record shows that omission of Powell did not prejudice the election in such a manner as to require a second election. Powell was already known to Local 727 because he was already a member of Teamsters Local 727. (Tr., Dec. 20, 2011 at 16, 103). Consequently, no prejudice to the ability of Local 727 to communicate with Powell, or through Powell to other voters, would have occurred. Powell himself was not aware that he had been omitted from the *Excelsior* list or deterred from participating in the election, as evidenced by the fact that he showed up to vote. (Tr., Dec. 20, 2011 at 12-13). As noted above, Powell did vote and his vote was counted in the Revised Ballot Tally. (Tr., Dec. 20, 2011 at 12, 13; Supp. Rpt. at 2). Thus, neither Local 727 nor Powell were prejudiced by omission of his name from the *Excelsior* list in such a manner as to require a second election.

**III. EXCEPTION TO THE FINDING THAT
CCS TRUCKING'S EXPLANATION FOR OMISSIONS FROM THE *EXCELSIOR* LIST
WERE SO LEGALLY INSUFFICIENT AS TO REQUIRE A SECOND ELECTION.**

Nothing in the record as regards CCS Trucking's explanations for the omission of Powell and Kendal warrants the conduct of a second election.

Kendal, the only eligible voter who did not vote because he was omitted from the *Excelsior* list, was omitted because he was believed by CCS Trucking, *at the time the Excelsior list was submitted*, to be a temporary replacement for James Livsey, Sr. It is undisputed that Livsey Sr. was on medical leave to care for his ailing father at the time Kendal was hired. (Tr. Dec. 20, 2011 at 110-111, 128). James Haasl, President of CCS Trucking, testified that he authorized the hiring of Kendal as a temporary replacement for Livsey Sr. (Tr. Dec. 20, 2011 at 103, 110, 128). Livsey Sr. went on leave to care for his ailing father on September 21, 2011. (Tr. Dec. 20, 2011 111). Kendal was hired at the end of September, 2011. (Tr. Dec. 20, 2011 at 105). The *Excelsior* list was compiled and submitted about 1 month later. Kendal admittedly was not told by CCS Trucking that he was being employed as a temporary replacement. (Tr. Dec. 20, 2011 at 33-34, 128-129). This was not unusual, since Livsey's return date was not known at that time. (Tr. Dec. 20, 2011 at 125). Kendal testified that he left another job to work for CCS Trucking. (Tr. Dec. 20, 2011 at 34). However, there is no evidence in the record that Kendal communicated this to CCS Trucking or that CCS Trucking was otherwise aware that Kendal had left another job. As correctly noted in the Supplemental Report, "when Livsey Sr. returned to work in November, 2011, Kendall continued to work as well." (Supp. Rpt. at 3). However, the Supplemental Report fails to note that Livsey Sr. worked only 2 weeks in November to make some money before returning to Arizona to care for his seriously ill father again. (Tr. Dec. 20, 2011 at 111-112, 125). It would have made no sense for CCS Trucking to terminate Livsey Sr.'s temporary replacement under such circumstances. Furthermore, these latter events are relevant only in hindsight. At the time the *Excelsior* list was submitted, Kendal was viewed by CCS Trucking as a temporary replacement for Livsey Sr.

Powell, whose omission from the *Excelsior* list did not keep him from voting, was omitted because he was not considered by CCS Trucking to be a regular employee. (Tr. Dec. 20, 2011 at 103). Powell's primary employment is in the movie industry, where he drives a truck and is a member of Local 727. (Tr. Dec. 20, 2011 at 103). He worked 3 times more in the movie industry than for CCS Trucking. (Tr. Dec. 20, 2011 at 27). Powell is not regularly scheduled to work with CCS Trucking. (Tr. Dec. 20, 2011 at 27, 106). He would call CCS Trucking when he was wasn't working in the movie industry and ask if they had work for him. (Tr. Dec. 20, 2011 at 26). Powell testified that CCS Trucking had only called him 2 times in the past year. (Tr. Dec. 20, 2011 at 26).

Furthermore, the Hearing Officer's determination that CCS Trucking's explanations for omission of Powell and Kendall from the *Excelsior* list were legally insufficient does not require the conduct of a second election. The Board noted, in *Woodman's Food Markets*, that:

"omissions may occur, notwithstanding an employer's reasonable and good faith efforts to comply, due to uncertainties about who is an eligible unit employee and other factors. Thus, we will consider the employer's explanation for the omissions."

Woodman's Food Markets, Inc., 332 NLRB 503, 504-505 (2000). The Board found that:

"the employer has not presented a legally sufficient justification for its omission of the 12 names."

Woodman's Food Markets, Inc., 332 NLRB at 505. However, the Board noted further that:

"the percentage of omissions (6.8%) was relatively small and, standing alone, might not warrant setting aside the election." (parenthetical explanation added)

Woodman's Food Markets, Inc., 332 NLRB at 505. The Board therefore did not order a new election on the basis of a finding that the employer's explanation was not legally sufficient. Instead, the Board ordered as follows:

“Accordingly, we shall remain this proceeding to the Regional Director for a determination as to the Keeseys’² eligibility. If it is determined that they are ineligible, the omitted names are not determinative and the results of the election should be certified.”

Woodman’s Food Markets, Inc., 332 NLRB at 505. This order contrasts sharply with the recommendation in the Supplemental Report that the Regional Director disregard the relatively small percentage of eligible voters who did not vote by reason of being omitted from the *Excelsior* list (7.7%) and the fact that Kendal’s vote could not have been determinative in an election where the Revised Tally of Ballots was 8-4, and still order a second election.

Absent a showing of bad faith, the Board has not set aside an election on the basis of a finding that the employer’s explanation was not, in hindsight, legally sufficient where the eligible voters who did not vote because they were omitted from the *Excelsior* list could not have been determinative or the percentage of omissions was significantly higher than in the instant case. Neither the Hearing Officer’s Report nor the Supplemental Report finds that CCS Trucking acted in bad faith. Nor would the record support such a finding.

IV. EXCEPTION TO THE RECOMMENDATION IN THE SUPPLEMENTAL REPORT, WHICH IS INCONSISTENT WITH THE BOARD’S DECISION AND DIRECTION.

The Hearing Officer’s alternative recommendation, as set forth in the original Hearing Officer’s Report, was as follows:

“... I recommend, in the alternative, that all six employees who were challenged as eligible voters, that their ballots be opened and counted, and that a revised tally of ballots issue. Should the results of the revised tally show that the omission of two employees from the *Excelsior* list could have had a determinative effect on the election, a re-run election should be conducted.”

²Two of the omitted voters were David Keeseey and Theresa Keeseey.

(Rpt. at 16).

The Board, on appeal, adopted the Hearing Officer's alternative recommendation, as follows:

"In light of the number of valid but uncounted ballots, we agree with the hearing officer's alternative approach. Accordingly, we shall remand the case to the Regional Director to open and count the challenged ballots, and thereafter to determine whether further proceedings are warranted in light of the revised tally and the *Excelsior* objections."

(Decision and Direction at 2).

The Hearing Officer's alternative approach did not, on its face, contemplate a new election unless the omission of Powell and Kendal could have been determinative. Clearly they would not have been determinative in an 8-4 election where Powell's vote had already been counted.

Neither did the Board's Decision and Direction contemplate a new election unless the omission of Kendal could have been determinative in light of a revised tally. The percentage of omissions and the legal sufficiency of CCS Trucking's explanations for the omissions were issues raised in the original Hearing Officer's Report and were before the Board on appeal. These issues did not, in the Board's view, compel the conduct of a new election in the absence of evidence that the omissions could have been determinative. This much is evidenced by the Board's remand. If these factors did not compel a new election in the absence of evidence that Kendal's vote could have been determinative, they certainly do not compel a second election in view of the lopsided nature of the Revised Tally of Ballots.

V. CONCLUSION.

The Supplemental Report was received by counsel for CCS Trucking via U.S. Mail on October 1, 2012. The foregoing Exceptions are therefore timely filed.

The Board held, in *Woodman's Food Markets*, that in deciding whether omissions from an *Excelsior* list require a new election it will consider the percentage of omissions, whether the number of omissions is determinative, and the employer's explanation for the omissions.

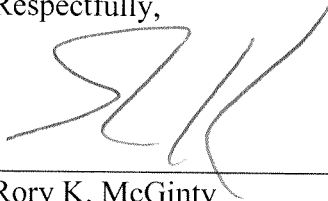
Woodman's Food Markets, Inc., 332 NLRB at 505.

The Supplemental Hearing Officer's Report recommends that the Regional Director disregard (a) the lopsided Revised Tally of Ballots (8-4); (b) the fact that Kendal's ballot could not have been determinative; and (c) the relatively small percentage of eligible voters who did not vote by reason of having been omitted from the *Excelsior* list (7.7%); and order a new election on the basis of factors which were before the Board prior to the remand. This would elevate omissions based on "uncertainties about who is an eligible unit employee" to a level of greater importance than the will of the overwhelming majority of unit members evidenced in the Revised Tally of Ballots at 8-4. No decision of the Board to date has disregarded the will of a clear majority in this manner. More particularly, the conduct of a second election, as recommended in the Supplemental Report, would be inconsistent with the Board's order in *Woodman's Food Markets*.

VI. PRAYER FOR RELIEF.

For the reasons set forth above, CCS Trucking urges that the Regional Director order the election be certified on the basis of the Revised Tally of Ballots.

Respectfully,

A handwritten signature in black ink, appearing to read 'Rory K. McGinty', written over a horizontal line.

Rory K. McGinty
For Respondent, Tractor Company d/b/a CCS Trucking

Dated: October 4, 2012

Law Offices of Rory K. McGinty, P.C.
5202 Washington, Ste. 5
Downers Grove, IL 60515
Phone 630-743-9907

CERTIFICATE OF SERVICE

I certify that a copy of the within instrument was served on all parties of record, at the addresses shown below, by depositing same with the U.S. Postal Service, postage prepaid, at Downers Grove, Illinois, and by electronic or fax transmission as indicated below, at or before 5:00 p.m. this 4th of October, 2012.



Rory K. McGinty

Served On:

Mr. Peter Sung Ohr, Regional Director
National Labor Relations Board, Region 13
209 S. LaSalle St., Ste. 900
Chicago, IL 60604
Filed Electronically at: nlrb.gov

Ms. Catherine Schlabowske, Board Agent
National Labor Relations Board, Region 13
209 S. LaSalle St., 9th Floor
Chicago, IL 60604
Deposited with U.S. Mail & Fax (312-886-1341)

Ms. Stephanie Brinson
Teamsters Local 727, IBT
1300 W. Higgins Rd., Ste. 111
Park Ridge, IL 60068
Deposited with U.S. Mail & Fax (847-720-4984)

Local 707, Truck Drivers, Chauffeurs,
Warehousemen and Helpers Union
2210 Midwest Rd., Ste. 310
Oakbrook, IL 60523
Deposited with U.S. Mail & Fax (630-575-0570)